No. 20,807

United States Court of Appeals

For the Ninth Circuit

LESLY COHEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I. A HEARING ON THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

We will not discuss the general principles with respect to the interception of mail by the Government in this Reply Brief since we feel the issue between the Government and ourselves on whether a so-called mail watch is legitimate has been adequately covered in our Opening Brief. We do feel, however, that we should answer the Government's contentions with respect to a denial of any hearing at all on the Motion to Suppress.

The Government criticizes our affidavit and infers that this was the only evidence before the Court on the question of mail tampering or wire tapping. We do not believe that it is possible to make any stronger

showing by affidavit than the one made by us without the confessions of Government agents who were actually involved in the proceedings themselves. A Government employee who admits knowledge of illegal activity on the part of the Government naturally faces the possibility of retaliation by his superiors. A defendant in a criminal case is hardly in a position to offer the protection necessary to convince such an employee to step forward by way of affidavit or otherwise. Only by the process of compulsory testimony at a jurisdiction hearing can such an employee practically be expected to testify. Here, counsel had interrogated persons contacted by the Government. The testimony of these persons indicated a familiarity on the part of Government agents with the contents of telephone conversations and mail. Counsel simply requested an opportunity to interrogate the agents with respect to their knowledge of the contents of telephone conversations and mail matter. This opportunity was denied by the Court. But in addition, in the present case the only thing before the Court was not the affidavit of counsel. Here, the Government itself filed affidavits and admitted tampering with the defendant's mail. The only thing denied in the Government's affidavits is the extent to which it engaged in the practice. We submit that once the smoke of such an admission rolls across the record, counsel should be given an opportunity by examination under oath to determine what fire was the cause.

It is impossible for us to conceive any legitimate reason why the Government should oppose an inquiry

into the facts surrounding the mail watch. If the Government had nothing to hide it should welcome inquiry. In the instant case there was no question of interrupting a trial with respect to a collateral issue. The Motion to Suppress was timely made and an examination of the witnesses could not be said to be an undue burden on the time and facilities of the United States District Court.

We are somewhat puzzled by one argument by the Government with respect to the denial of the hearing. Government counsel seems to imply that no attempt was made to re-introduce the question at the trial. Since arrangements were made with counsel for the Government with respect to the very witnesses subpoenaed at the Motion to Suppress at the trial of the case. Counsel for the Government must be aware that these witnesses were subpoenaed at the trial and aware that Judge Wollenberg had advised counsel he intended to follow Judge Harris's rule and preclude inquiry into wiretapping or mail tampering. TR 508; TR 44. Counsel was precluded from inquiring as to the leasing of telephone lines by the Federal Government. TR 44. In its cross-examination of the Nevada Telephone Company employee, the Court actually said at page 508 of the transcript that with respect to renewing a Motion to Suppress, "It will be denied as it was previously."

In this connection it should be noted that in other judicial proceedings the Government has admitted tapping wires in Las Vegas. As we recall, as developed in *Hoffa v. United States,* at least twenty-nine tele-

phone lines were tapped by the Government. Whether the defendant here was one of the twenty-nine, could not be established because the Court would not allow the Government to be questioned on the subject.

II. EVIDENCE WAS INSUFFICIENT TO SHOW KNOWLEDGE.

We think the argument of Government counsel with respect to sufficiency of the Government to establish knowledge can be most accurately characterized from the Government brief at page 32: "The absence of such conversation logically indicates the opposite fact, that Schuman was phoning from the San Francisco area."

In other words, the Government in the Court of Appeals as it did in the Court below, is attempting to affirmatively prove knowledge from a lack of evidence.

A knowledge of the location of the caller in a criminal case which requires proof beyond a reasonable doubt cannot be proved by a failure of the defendant to inquire as to the caller's location. The Government has accused the defense of speculation with respect to the Motion to Suppress. Here, however, the Government is inviting the Court of Appeals to engage in the vaguest kind of speculation to supply the affirmative evidence required by the criminal law. The burden is on the Government to prove that the defendant did know from where the call was placed, not that he should have known or should have inquired concerning the witnesses' location.

Here, the witnesses used to prove the Government's case had all been in Las Vegas and had business interests there. The conviction ultimately rested on one telephone call. We submit that this Court cannot affirm on the grounds that the conversation did not include an assertion by Mr. Schuman that he was in Las Vegas. In order to prove knowledge, the Government must prove that Schuman said or otherwise indicated that he was in the San Francisco area.

The Government makes some assertions concerning the manner of the call. It is extremely unclear as to whether or not they are claiming the manner of placing the call somehow indicates the call was to the knowledge of the defendant a long distance call. If the Government had any such evidence they would have introduced it.

We are sure the Court is aware of the difference between a long distance station-to-station call and a person-to-person call. No proof was ever established here to prove a person-to-person call. Schuman's language cannot be tortured into a statement that such was the case. If there had been an operator on the line, that fact would have been developed. It was not. The record clearly shows that there was no indication in the conversation or manner of placing the call which could have reasonably indicated to Mr. Cohen that either Mr. Schuman or Mr. Syufy were calling from out of State.

III. THE COURT ERRED ON ITS INSTRUCTIONS TO THE JURY ON THE ISSUE OF INTENT.

In discussing the instruction objected to by the defense on intent, the Government relies almost entirely on the case of *Sherwin v. United States,* 320 F.2d 137. Counsel for the defense is quite familiar with that case. We submit that this Court in *Sherwin v. United States* never approved the instruction but simply indicated in the circumstances there present it would not reverse.

The Supreme Court denied certiorari in the *Sherwin* case but on the same date it also refused certiorari in a case in which the Court reversed on an identical instruction. *Mann v. United States,* 319 F.2d 404 cert. denied 375 U.S. 964.

We submit that the rule is clear in this Circuit with respect to this instruction. See *Forester v. United States* (9th Cir.) 237 F.2d 617. Here, the crucial issue for the jury was intent depending upon the proof of knowledge of Schuman's location at the time of the call. The jury was allowed to presume this intent from the fact that a call was actually made from San Francisco. We submit that such an instruction requires reversal here.

IV. THE WAGERING EXCISE TAXES STATUTE AND SECTION 1084 SHOULD BE CONSTRUED TOGETHER.

We should advise the Court that *Costello v. United States,* 34 LW 2278, is being argued before the Supreme Court this week. The case involves the con-

stitutionality of the Wager Tax Law and may very well involve the Court in a discussion concerning the various efforts of the Federal Government to regulate gambling. Insofar as it does so, the Court's decision may bear on the interpretation of Section 1084. Whether a social bet among friends can constitute such a burden on interstate commerce as to allow the Federal Government constitutionality to regulate it conceivably could be determined by the decision in the *Costello* case.

The Government's contention that the two statutes are unconnected, we think untenable. The legislative history indicates just the contrary. The only difference pointed to by the Government between the statutes is the bland assertion that "the business of wagering" is broader than "the business of accepting wagers." To us, we can see no difference other than grammar between the two phrases. What we are dealing with is two felony statutes, both of which we believe should require like principles.

The language in the objected to instruction incorporated another provision of the Internal Revenue Code, that is to say, Sections 4411 and 4412, which ultimately imposes misdemeanor penalties on one engaged in wagering "on behalf of" another person.

The Court grafted this misdemeanor situation onto the provisions of Section 1084. We believe that Congress in providing the more extreme penalty intended to limit prosecution to misdemeanors. Otherwise this misdemeanor language "on behalf of" would have been engrafted in the provisions of Section 1084. We

do not believe such a requirement can be added by judicial fiat.

V. THE EXAMINATION OF SCHUMAN WAS IMPROPERLY LIMITED.

The Government answers our objection that cross-examination was improperly limited with respect to Schuman's request for immunity by asserting that the examination was *not limited.* It does so by indicating the record quotations where the statements of Mr. Schuman were incorporated in the record. What the Government fails to point out is that this stipulation was not introduced before the *jury* but simply introduced to indicate to the Court of Appeals that Mr. Schuman had, in fact, requested immunity. The Court did not allow Schuman to be questioned on this request in the presence of the jury. It is for this reason error is urged here.

VI. THE GOVERNMENT HAS CHANGED ITS CONTENTION WITH RESPECT TO DROSSMAN, HOCKFELD AND STEAD.

At the trial the Government introduced the testimony of the above named witnesses for the sole and limited purpose of proving intent. The Court gave with the Government approval a limiting instruction. They now claim that the evidence was introduced to prove that Appellant was in the business of wagering. This, we believe, they cannot do at this late date.

The testimony must stand or fall on whether it properly showed proof of intent and, in this connec-

tion, as we indicated in our opening brief, the testimony was not probative. The testimony was simply a hodge-podge of vague statements about gambling and telephone calls before the effective date of Section 1084. It was introduced on the basis that there were similar offenses. The proof, however, did not show similar offenses. The testimony was therefore prejudicial and should require reversal.

VII. CONCLUSION.

We have not answered the Government's contention with respect to the presumption of knowledge of the law and duplicity, for the reason we believe that these and other matters urged are adequately covered in our Opening Brief.

Here, the appellant has been convicted of a felony for a casual wager with a social acquaintance of thirty years standing with not a scintilla proved to show that he knew he was engaged in an interstate phone call.

In our opinion, this kind of conduct in the circumstances of this case is not criminal and, in view of the errors committed at the trial, the conviction should be reversed.

Dated, San Francisco, California,
October 14, 1966.

Respectfully submitted
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